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No. 97-2044

In the Supreme Court of the United States

OCTOBER TERM, 1998

UNITED STATES OF AMERICA, PETITIONER

v.

HAGGAR APPAREL CORPORATION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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I. *The Treasury regulations issued under the Tariff Act are entitled to deference in determining the proper tariff classification of imported goods.*

1. The sole rationale offered by the court of appeals for holding that the Treasury regulations that interpret the classification provisions of the Tariff Act "are entitled to [no] deference" (Pet. App. 3a) is that 28 U.S.C. 2643(b) directs the Court of International Trade to "reach the correct decision" in cases within its jurisdiction (Pet. App. 4a). For the reasons explained in detail in our opening brief, that reasoning is plainly incorrect. Respondent acknowledges this by declining to make any effort in this Court to support or defend the reasoning of the courts below. The text and history of 28 U.S.C. 2643(b) confirm that it is nothing more than a procedural device that permits the Court of Inter-

national Trade to remand a case to the agency for further administrative proceedings when appropriate.[1] See U.S. Br. 17. Nothing in that procedural statute supports the conclusion of the courts below that the Court of International Trade is to "ignore[] the regulation altogether" (Pet. App. 23a) in tariff classification cases. See U.S. Br. 15-18.

2. Having abandoned the rationale of the courts below, respondent seeks to rely on a different theory in this Court. Respondent contends that, because the Court of International Trade is to make a "de novo" determination of the factual issues involved in classification decisions, the court is to give no deference to agency interpretations or regulations in determining and applying the applicable law. That new theory—like the now abandoned theory that respondent urged below—is fundamentally flawed.

(a) Respondent complains that it "is nothing short of startling" (Resp. Br. 15) that the government—like the courts below—has not addressed the language of 28 U.S.C. 2640(b). That statute specifies that, in tariff protest cases, the Court of International Trade is to "make its determinations upon the basis of the record made before the court" (28 U.S.C. 2640(a)). Respondent asserts that this statutory

[1] Respondent does not even cite this procedural statute until the last page of its brief, where it states that 28 U.S.C. 2643(b) authorizes a remand for "further proceedings" in this case (Resp. Br. 50). *Amici* Anhydrides & Chemicals, Inc., et al., similarly acknowledge that this statute is only "a provision for evidentiary remand" (Am. Br. 22). See also U.S. Br. 17 n.5. *Amicus* Customs and International Trade Bar Ass'n suggests (Am. Br. 20) that it is unusual for a statute expressly to confer a duty on a court to reach a "correct decision." The statute, however, does not impose a "duty" to reach a "correct decision"; it merely authorizes a remand when doing so is "necessary to enable it to reach the correct decision." 26 U.S.C. 2643(b). There is nothing unusual in a remand procedure of this type. As Congress noted, this provision merely gives the Court of International Trade a "remand power * * * co-extensive with that of a federal district court." H.R. Rep. No. 1235, 96th Cong., 2d Sess. 60 (1980).

provision, which merely directs the Court of International Trade to decide all questions of *fact* in "a trial *de novo*" on the record assembled in that court (S. Rep. No. 466, 96th Cong., 1st Sess. 18-19 (1979)), somehow also directs the Court of International Trade to decide all questions of law without affording any deference to the Treasury regulations that interpret and implement the Tariff Act.

This extraordinary contention is utterly unsupported. By requiring "a trial *de novo*" (Resp. Br. 17) in the Court of International Trade, the statute merely places customs cases in that court on precisely the same footing on which all *other* types of tax cases are adjudicated in the Tax Court, the Court of Federal Claims, and the federal district courts.[2] In tax cases that arise under the Internal Revenue Code, as in customs cases that arise under the Tariff Act, an enforcement agency within the Treasury Department makes an administrative determination of the amount of tax due. See 26 U.S.C. 6212 (determination of deficiency). That

[2] The history of the origins of the Court of International Trade recounted in respondent's brief (Resp. Br. 4-5) parallels, of course, the history of the origins of the Tax Court. Both of these specialized tribunals began as administrative components of the Treasury Department. When they were established as courts independent from that agency, they were given the responsibility of making findings of fact based on the record assembled in the cases tried before them. See 26 U.S.C. 7459(b); H. Dubroff, *The United States Tax Court: An Historical Analysis* 35-60, 165-215, 307-314, 334-339 (1979). Proceedings in the Tax Court on tax deficiencies determined by the Internal Revenue Service, like the proceedings in the Court of International Trade on customs protests, are "unlike judicial review of the actions of other agencies [in that] any 'record' made in the Service, including the reasons for its assessment, is irrelevant. The action involves a de novo determination of the correct tax and is not a review of the administrative processing of the case." M.I. Saltzman, *IRS Practice and Procedure* ¶ 1.05[2][a], at 1-31 (2d ed. 1991). See also 26 U.S.C. 7482(a)(1) (decisions of the Tax Court are reviewed in the courts of appeals "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury").

administrative determination is then reviewed in the courts: (a) for internal revenue cases, it is reviewed in the Tax Court or in a refund suit brought in the Court of Federal Claims or the federal district courts; (b) for customs cases, it is reviewed in the Court of International Trade. In determining the proper amount of taxes or duties due, *all* of those courts are to make "de novo" findings of fact based only on the "record made before the court" (28 U.S.C. 2640(a)); and, in applying the applicable law to those findings, these courts are to make an independent determination of the law. See note 2, *supra*. In making such "de novo" determinations of fact and law, however, these courts have consistently been directed to defer to the formal interpretations of the applicable law adopted by the Treasury Department under these statutes.[3] This Court has specifically held in these cases that "the task that confronts [the courts] is to decide, not whether the Treasury regulation represents the best interpretation of the statute, but whether it represents a reasonable one." *Atlantic Mut. Ins. Co.* v. *Commissioner*, 118 S. Ct. 1413, 1418 (1998) (review of Tax Court decision in tax case). Accord, *National Muffler Dealers Ass'n* v. *United States*, 440 U.S. 472, 477 (1979) (review of federal district court decision in tax case); *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450 (1978) (review of Customs Court decision in customs case).

These courts are unquestionably the sole finders of fact in each of these various types of tax cases. Like all other courts, including this Court, these courts are also to determine all questions of law "de novo" in the cases that

[3] Respondent mistakenly implies (Resp. Br. 35) that the regulations involved in this case were issued by the Customs Service rather than by the Treasury Department. As we have explained (U.S. Br. 13 n.3), the authority to issue regulations under the Tariff Act is vested in the Secretary of the Treasury. The regulation challenged in this case became effective only upon "the approval of the Secretary of the Treasury." Treas. Dep't Order No. 165, Treas. Dec. 53160 (Dec. 15, 1952).

come before them.[4] In making these independent legal determinations, however, it is well established that these courts are to defer to the agency's regulatory interpretation if it is "reasonable." *Zenith Radio Corp.* v. *United States*, 437 U.S. at 450. In a case that arose in the predecessor of the Court of International Trade, this Court held that that court (like the Tax Court and the district courts in other tax cases) should "show[] great deference to the interpretation given the statute by the officers or agency charged with its administration." *Ibid.*[5] See also U.S. Br. 20-21. Nothing in respondent's newly asserted contentions addresses these fundamental and well-established rules.[6]

[4] In its decision below, the court of appeals merely noted this ordinary rule in stating that, "[o]n appeal, we review the findings of [the court below]—not those of Customs for—clear error; while we decide questions of law *de novo*" (Pet. App. 4a).

[5] Addressing this controlling decision only in a footnote, respondent asserts that the holding in *Zenith Radio* that the Customs Court is to defer to the agency's reasonable interpretations of the Tariff Act is not pertinent here because (i) that case "predates the 1980 Act" and (ii) it "involved countervailing duties, which have sensitive foreign policy implications" (Resp. Br. 28 n.6). Those purported distinctions are plainly of no consequence. Respondent does not claim that the 1980 Act *changed* the degree of deference to which Treasury regulations are entitled in tariff protest cases; instead, respondent claims that the 1980 Act "preserved" the prior rule (Resp. Br. 6). Moreover, in *Zenith Radio* the Court merely applied to customs cases the principle of deference that applies to all formal interpretations issued by the "agency charged with * * * administration" of the statute (437 U.S. at 450). That holding, of course, applies as directly here as it did in *Zenith Radio*. The Court did not suggest, much less hold, in *Zenith Radio* that such ordinary interpretive principles apply only when "sensitive foreign policy" issues are involved.

[6] Chief Judge Re of the Court of International Trade articulated this same principle in describing the deference owed to Treasury interpretations of the Tariff Act in the *Proceedings of the Fifth Annual Judicial Conference of the United States Court of International Trade*, 126 F.R.D. 335, 337-338 (1988). He noted that, even though the court is "the final authority on issues of statutory construction," deference must be

(b) Ignoring these settled principles, respondent argues that, in situations where "Congress has provided that a party's liability under a statute would be determined in an independent judicial trial, courts consistently have refused to accord *Chevron* deference even to 'full dress' regulations promulgated pursuant to a grant of substantive rulemaking power" (Resp. Br. 26 (citation omitted)). That extraordinary contention is plainly incorrect. The tax and customs cases already cited directly refute respondent's assertion. Moreover, *Chevron* deference routinely applies in cases (such as the present one) in which the court is to determine the facts *de novo* and is to make an independent determination of the applicable law. See, *e.g.*, *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735, 739-741 (1996) (damages suit in state court claiming that late payment charges were prohibited "interest"); *Auer* v. *Robbins*, 519 U.S. 452, 456-458 (1997) (private suit for overtime pay); *United States* v. *O'Hagan*, 117 S. Ct. 2199, 2218 (1997) (criminal case). Whenever, in such cases, the formal interpretation of a statute by the agency charged with the responsibility of administering that statute is placed in question, the *Chevron* standard has consistently been applied by this Court. See also, *e.g.*, *Blum* v. *Bacon*, 457 U.S. 132, 141 (1982); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

Indeed, the very decision that respondent cites as the "leading case" (Resp. Br. 26) for its erroneous proposition makes this exact point. In *Adams Fruit Co.* v. *Barrett*, 494 U.S. 638 (1990), the Court declined to accord *Chevron* deference to a regulation that purported to interpret the scope of the jurisdiction of the courts in direct private actions brought under the statutory enforcement scheme involved in

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given to Treasury interpretations in customs cases because "[i]t is axiomatic that a court must accord due weight to an administrative agency's interpretation of a statute that the legislature has directed the agency to administer." *Ibid.*

that case. The Court declined to afford *Chevron* deference to that regulation because "[a] precondition to deference under *Chevron* is a congressional delegation of administrative authority" and "[n]o such delegation" of authority to interpret the "enforcement" authority of the *courts* had been made to the agency in that case. *Id.* at 649, 650. By contrast, however, the Court emphasized that the agency's power to interpret the *substantive* provisions of the statute remained fully in place. The Court noted that the statute "clearly envisioned, indeed expressly mandated, a role for the [agency] in administering the statute" to "promulgate *standards* implementing" the substantive statutory scheme. *Id.* at 650. The court emphasized that, even though the sole enforcement authority had been vested in the courts, the "determinations [made by the agency] within the scope of [its] delegated authority are entitled to deference." *Ibid.*

No other authority is cited by respondent to support its radical contention that courts are not "to defer to the agency's statutory construction even where the construction is embodied in regulations and even where the agency otherwise possesses substantive rulemaking power" (Resp. Br. 27).[7] The "leading" decision that respondent cites makes clear that, even in situations in which the agency lacks

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[7] The only other case that respondent cites in connection with this contention (Resp. Br. 26-27) is *Sims* v. *Department of Agriculture*, 860 F.2d 858 (8th Cir. 1988). That case also provides no support for the proposition that agency regulations have no weight in judicial enforcement proceedings. In *Sims*, the agency took the position that the "guidelines" it had issued were not binding because they were *not* issued as interpretive regulations. *Id.* at 861. The court concluded that it was unnecessary to decide whether the guidelines were binding "regulations" because the agency had not "depart[ed]" from them. The court further noted that, while such "guidelines" would not be "binding on the court in making its de novo review," they were nonetheless "helpful in interpreting the law and regulations." *Id.* at 863. This decision obviously provides no support for respondent's sweeping proposition that formal interpretive regulations are entitled to no deference in judicial enforcement proceedings.

enforcement authority under the statute, the agency's formal interpretations of the substantive provisions of the statute that it administers "are entitled to deference" in the courts. *Adams Fruit Co.* v. *Barrett*, 494 U.S. at 650. See also *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837, 844 (1984). Indeed, it is precisely in such judicial enforcement cases that this Court has emphasized that "[i]t is our practice to defer to the reasonable judgments of agencies with regard to the meaning of ambiguous terms in statutes that they are charged with administering." *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. at 739.

(c) Respondent contends (Resp. Br. 20-21) that *United States Department of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), provides implicit support for a rule that agency legal interpretations are entitled to no deference when enforcement disputes are subject to a *de novo* trial in federal court. Nowhere in that case or elsewhere, however, has the Court articulated any such proposition. In *Reporters Committee*, the Court simply referred to the court's statutory responsibility in a Freedom of Information Act case to "determine the matter do novo" (5 U.S.C. 552(a)(4)(B)) in describing its obligation to make an independent determination of the disclosure issues presented under that statute. 489 U.S. at 755, 776. Nothing in that case purports to establish that, in every type of federal enforcement case in which courts are to hold trials, the regulations issued by the agency under statutes that they administer are to be ignored by a reviewing court.

Other similar cases cited by respondent (Resp. Br. 22-23) are likewise inapposite.[8] For example, this Court's decision

[8] The other decisions that respondent cites (Resp. Br. 22-24) are similar to *Reporters Committee* in that they also involve the application of the FOIA. As Justice (then Chief Judge) Breyer stated in one of the decisions that respondent cites, the distinctive feature of the FOIA is that the statute imposes obligations on the agencies that are administered by the courts. It is thus different from the "ordinar[y]" situation in which "a court would give special weight to the agency's interpretation of the language of the statute * * * the agency administers." *Aronson* v. *IRS*, 973 F.2d 962, 965 (1st Cir. 1992). Indeed, the FOIA applies to a multitude of agencies. By contrast, as this Court emphasized in *Zenith Radio*, it is the "ordinary" rule that applies to the Treasury Department's interpretation of the Tariff Act, for courts are to "show[] great deference to the interpretation given the statute by the officers or agency charged with its administration." 437 U.S. at 450.

The present case also does not involve "de novo" review of agency findings under the Administrative Procedure Act. Under the APA, although "de novo" review "allows the court to make independent findings of fact," only "decisions which are clearly erroneous or unwarranted by the facts may be overturned" (6 J. Stein, et al., *Administrative Law* § 51.04, at 51-151 (1998)). Actions involving customs and other taxes do not arise under the APA and are not based upon review of the administrative record. See note 2, *supra*.

in *United States* v. *First City National Bank*, 386 U.S. 361 (1967), does not address or consider the degree of deference owed to agency regulations. The issue in *First City National Bank* was solely "the procedural" question whether the determination of the Comptroller in a bank merger dispute is subject to review under a substantial evidence standard or is instead to be reviewed de novo by the district court. *Id.* at 369 n.1. The Court held that the determination made by the Comptroller is to be reviewed *de novo*, as the applicable statute expressly required. *Id.* at 368. Contrary to the suggestion of respondent's brief (Resp. Br. 22), the Court did not depart from the established rule that, in making an independent determination of the applicable law, courts are to defer to formal statutory interpretations issued by the agency charged by Congress "with responsibility for administering the provision" (*Chevron*, 467 U.S. at 865). That issue was simply not addressed in that case. Indeed, the Court expressly declined to express any "views on the merits" in *First City National Bank* and stated that "[a]ll

questions except the procedural ones treated in the opinion are reserved." 386 U.S. at 369 n.1.

3. Raising further new contentions, respondent argues that Congress has authorized the Treasury to issue only two specific types of rules: (i) rules "that bind * * * customs officers" and (ii) rules that establish procedures for importers to follow "in bringing goods into the country and preserving their claims" (Resp. Br. 28). Respondent advances no authority for this proposition and, indeed, no decision could be cited to support it. Respondent instead relies solely upon a cramped and inaccurate exposition of the simple language of the statutory provisions.

(a) The various delegations of authority that Congress made under the Tariff Act are set forth in detail in our opening brief (U.S. Br. 12-13 & n.2). The most general of these provisions state that "[t]he Customs Service shall, under rules and regulations prescribed by the Secretary * * * fix the final classification and rate of duty applicable to such merchandise" (19 U.S.C. 1500(b)) and, in turn, that "[t]he Secretary of the Treasury shall establish and promulgate such rules and regulations not inconsistent with the law * * * to secure a just, impartial, and uniform appraisement of imported merchandise and the *classification* and assessment of duties thereon at the various ports of entry" (19 U.S.C. 1502(a) (emphasis added)). The relevant legislative history, which respondent has ignored, states that Congress understood that, under these provisions, "[t]he Customs Service will be responsible for interpreting and applying the[ ] Harmonized Tariff Schedules of the United States" (U.S. Br. 13 n.2, quoting H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 549 (1988)).[9] Indeed, respondent ultimately acknowledges that, in enacting these provisions, Congress granted express authority to the agency to interpret the classification provisions of the Tariff Act. Respondent asserts nonetheless that, because the statute authorizes the agency to interpret the classification provisions "*at the various ports of entry*" (19 U.S.C. 1502(a) (emphasis added)), the agency's regulations should be binding *only* on customs officers and should have no effect on importers or the courts (Resp. Br. 30).

That strained contention, which is unsupported by any authority, ignores the fact that customs duties only *arise* when the merchandise has "arrived at the port of entry." *United States* v. *Vowell and M'Clean*, 9 U.S. (5 Cranch) 368, 372 (1809).[10] The fact that the agency's regulations address

[9] Respondent cites a 1960 study that it asserts is part of the "legislative history of Headnote 11" of the HTSUS (Resp. Br. 32-33). The isolated extracts that respondent quotes from that study note that customs officers will need "instructions" under the Tariff Act because they lack discretion "in determining a tariff classification" and must "enforce the tariff laws as enacted by the Congress" (*ibid.* (emphases omitted)). Whatever meaning is to be attributed to these ambiguous extracts from the 1960 study, it is manifest that Congress itself intended that, in performing this enforcement function, the Treasury would be "responsible for interpreting and applying the[ ] Harmonized Tariff Schedules of the United States." H. R. Conf. Rep. No. 576, *supra*, at 549.

Moreover, while respondent suggests that the rulemaking power that is expressly granted to the Treasury under Headnote 11 of the TSUS is limited to rules relating to "the physical movement of goods" (Resp. Br. 31), respondent ultimately acknowledges (*id.* at 31-32) that this Headnote also authorizes the Treasury to adopt rules for the classification of goods when—as in the present case—the "importer's claim for classification" cannot be determined from a physical "examination of the article itself in its condition as imported" (General Headnote 11 of the TSUS, 19 U.S.C. 1202 (1982)). That provision applies directly here, for a customs inspector would not know, merely by inspecting an article in the condition imported, whether improvements had been made abroad in a manner "incidental to assembly."

[10] It was in *Vowell and M'Clean* that Chief Justice Marshall emphasized for the Court that, when a question of interpretation of tariff legislation is "doubtful," courts are to "respect[] the uniform construction which it is understood has been given by the treasury department of the United States." 9 U.S. (5 Cranch) at 372. Respondent correctly notes

"classification * * * at the various ports of entry" (19 U.S.C. 1502(a)) stems from that simple fact. Respondent's novel contention that Congress empowered the Secretary to issue "regulations" that apply only to customs officers and to no one else is plainly insubstantial.[11] The Secretary does not require a statutory authority to adopt "regulations" merely to give instructions to the Department's employees; and a "regulation" cannot serve to clarify the law if it has no bearing for the public or the courts.

(b) Respondent nonetheless asserts that the agency's regulations themselves manifest an intent that no one but customs officers be bound by them. Respondent notes that, in setting forth "the constructions and interpretations that the United States Customs Service shall give to relevant statutory terms," the regulations emphasize that they do not, in any fashion, "restrict the legal right of importers or others to a judicial review of the matters contained therein." 19 C.F.R. 10.11(a). That statement in the regulations is both factually correct and consistent with this Court's decisions. It is factually correct because nothing in the regulations *does* restrict or "purport[]" to restrict "the legal right of importers" to "judicial review of the matters contained" in the

(Resp. Br. 46) that the Court applied that principle of deference in *Vowell and M'Clean* to govern a situation in which the agency, thinking the facts of that case supported a different rule, had applied a different construction. The Court concluded that the facts did not support a different rule and that the Treasury's established rule would have been applicable to that case as well if the question had been "doubtful." 9 U.S. (5 Cranch) at 372.

[11] Nor does the fact that the decisions of the Secretary in customs disputes are expressly "binding upon" customs officers (19 U.S.C. 1502(b)) mean, as respondent asserts (Resp. Br. 30-31), that the agency's regulations are binding on no one else. The provisions of subsection (b) instead ensure that customs officers make their determinations under the same regulations that the Secretary issues under Section 1502(a) to guide the public generally.

regulation. *Ibid.* For example, this very case involves precisely such judicial review.

Moreover, as this Court emphasized in *Adams Fruit Co.* v. *Barrett*, 494 U.S. at 649-650, an agency's regulations cannot repeal a right of judicial review that Congress has established by statute. As the Court further held in that case, however, the fact that such judicial review occurs does not deprive the agency's interpretations of the substantive provisions of the statute of meaning. *Ibid.* Instead, as this Court has held on numerous occasions, including in prior customs cases, deference is owed to the agency's "reasonable" interpretations of the substantive provisions of the statute that it administers. *Zenith Radio*, 437 U.S. at 450; Pet. Br. 20-21.

The lengthy string of cases in which the agency has litigated the question of the deference owed to its tariff classification regulations (see U.S. Br. 18 n.7), along with the prior, acknowledged responsibility of the Court of International Trade to "defer to the agency's [reasonable] interpretation of the statute" (Chief Judge Edward D. Re, *Litigation Before the United States Court of International Trade*, 19 U.S.C.A. §§ 1-1300, at XLI (West. Supp. 1998)), evidence that the agency has consistently taken the position that its regulations are binding on importers.[12] Respondent's contention that the agency misunderstands the effect of its own regulation is implausible because, as respondent acknowledges elsewhere, "very great deference is paid to an agency's interpretation of its own regulations" (Resp. Br. 36, citing *Udall* v. *Tallman*, 380 U.S. at 16-17).

[12] Both the agency and the courts have long understood that Treasury regulations apply to importers as well as customs officers. See, *e.g.*, *Proceedings of the Fifth Annual Judicial Conference of the United States Court of International Trade*, 126 F.R.D. 335, 337-338 (1988) (discussing deference owed to the agency's regulations in the customs protest cases brought by importers in that court).

Amicus Customs and International Trade Bar Association offers a wholly different view of the significance of the reference in the regulation to the availability of "judicial review of the matters contained therein" (19 C.F.R. 10.11(a)). That *amicus* asserts that this statement is an "explicit recognition" by the Treasury that it was adopting "an 'interpretive rule,' as opposed to a legislative rule'" (Am. Br. 29). But, whether characterized as interpretive or legislative, the courts are plainly not to "ignore[ ] the regulation altogether" (Pet. App. 23a). Instead, as this Court explained in *Chevron*, 467 U.S. at 843-844, under either characterization, the agency's interpretations are entitled to significant deference. When "there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation," the "regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Ibid.* When the agency's authority to interpret the statute is only "implicit rather than explicit," and flows merely from the inherent need to make "rules to fill any gap" left in the statute by Congress, the Court has emphasized that a reviewing court is to defer to "a reasonable interpretation made by the administrator of an agency." *Ibid.*

4. *Amici* Anhydrides & Chemicals, Inc., et al., contend that deference to Treasury interpretations of customs legislation is inappropriate because, under the "rule of lenity," any ambiguity in the statute should be resolved in favor of the importer (Am. Br. 4-29). As the *amici* note, the rule of lenity has long been applied to cases involving customs duties and to all other forms of federal taxation as well (Am.

Br. 9-10). But here, as in *Reno* v. *Koray*, 515 U.S. 50, 64-65 (1995), *amici* "misconstrue[ ]the doctrine" of lenity:

> A statute is not "'ambiguous' for purposes of lenity merely because" there is "a division of judicial authority" over its proper construction. *Moskal* v. *United States*, 498 U.S. 103, 108 (1990). The rule of lenity applies only if, "after seizing everything from which aid can be derived," *Smith* v. *United States*, 508 U.S. 223, 239 (1993)(internal quotation marks and brackets omitted), we can make "no more than a guess as to what Congress intended." *Ladner* v. *United States*, 358 U.S. 169, 178 (1958).

One of the principles "from which aid can be derived" in the interpretation of statutes is the principle that deference is to be given to reasonable interpretations of tax and customs legislation by the Treasury—the agency that Congress has charged with enforcement of these complex provisions. See *Zenith Radio*, 437 U.S. at 450. See U.S. Br. 31. The rule of lenity does not alter that established principle.

5. Finally, respondent says that there is simply no need for interpretive regulations because "the President, on the recommendation of the [International Trade Commission], is authorized to modify" a classification term if necessary (Resp. Br. 37). It is, of course, equally true that Congress has power to amend the statute. Until a specific fact pattern has caused frequent litigation, however, the need for such modification or amendment would not be manifest. Interpretive authority is vested in the Treasury so that unnecessary litigation of the "limitless factual variations" that arise under tax legislation may be avoided through authoritative advance guidance from the agency that is "responsible for putting the rules into effect." *National Muffler Dealers Ass'n*, 440 U.S. 477. That sound public purpose could not be achieved if the Treasury were deprived of the power Congress granted it to issue "such rules and regulations" as are

needed to ensure the proper "classification and assessment of duties" (19 U.S.C. 1502(a)).

II. *The challenged regulation should be sustained as a reasonable interpretation of the statute.*

1. Respondent contends that, "[b]ecause each article has its own assembly process" (Resp. Br. 39), the statutory duty exception for "operations incidental to the assembly process" requires a case-by-case analysis that is incompatible with any categorical, interpretive rules. That contention, however, fails to consider that, immediately following the phrase "incidental to the assembly process," the statute itself provides *categorical* examples "*such as* cleaning, lubricating and painting" (HTSUS Subheading 9802.00.80 (emphasis added)).[13] By providing such examples, the statute plainly contemplates that a categorical identification of operations "incidental" to assembly is appropriate. It is therefore implausible for respondent to contend that the statute requires the agency and importers to litigate the specific facts of every case to determine whether recurring types of operations are, or are not, "incidental" to assembly.[14]

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[13] Respondent's argument thus violates "the canon of construction that 'the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *United States* v. *R.L.C.*, 503 U.S. 291, 314 (1992), quoting from *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989).

[14] The fact that "categorical" rules may be adopted does not, of course, resolve whether a particular operation comes within a particular rule. See, *e.g.*, *General Motors Corp.* v. *United States*, 976 F.2d 716, 718 (Fed. Cir. 1992) (extensive automotive "finish painting" held not to constitute the type of "painting" "of such a minor nature as to be considered incidental to the main assembly process"); *Chrysler Corp.* v. *United States*, 86 F.3d 1173 (Fed. Cir.), cert. denied, 519 U.S. 823 (1996) (same). For example, as respondent notes (Resp. Br. 45), an operation that involves pressing alone, as an incident of assembly, would not, for that reason alone, be "permapressing" within the scope of the regulation. The present case, however, unlike the private letter ruling to which respondent refers

2. Respondent errs in asserting (Resp. Br. 41) that the regulation is too broad because it excludes from the term "operations incidental to the assembly process" *all* operations that have a "primary purpose" other than assembly. That contention ignores the language and rationale of both the statute and the regulation. The regulation interprets the statutory phrase "incidental to the assembly process" to exclude "[a]ny *significant* process, operation, or treatment other than assembly whose *primary purpose* is the fabrication, completion, physical or chemical improvement of a component" (19 C.F.R. 10.16(c) (emphases added)). By concluding that "significant" processes performed for the primary purpose of "fabrication, completion, physical or chemical improvement" are not merely "incidental" to assembly, the regulation articulates the same understanding of the statute reflected in its legislative history. As the House Report explains in describing why operations such as "cleaning, lubricating and painting" may be "incidental to assembly" (H.R. Rep. No. 342, 89th Cong., 1st Sess. 49 (1965) (emphasis added)):

> [I]n fitting the parts of a machine together, *it may be necessary* to remove rust; to remove grease, paint, or other preservative coatings; to file off or otherwise remove small amounts of excess material; to add lubricants; or to paint or apply other preservative coatings. * * * Such operations, *if of a minor nature* incidental to the assembly process, whether done before, during, or after assembly, would be permitted even though they result in

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(Resp. Br. 45), involves far more than pressing alone. Indeed, as the courts below acknowledged, the ovenbaking procedure that respondent performs in the "chemical improvement" of articles through permapressing constitutes a "significant" operation that, unlike pressing alone, is "*not* necessary, nor related to assembly" (Pet. App. 19a (emphasis added)). These basic findings have not been disputed by respondent in this Court.

an advance in value of the U.S. components in the article assembled abroad.

As the facts of this case demonstrate, the agency reasonably concluded, by contrast, that permapressing operations performed abroad are *not* "of a minor nature" and are *not* "necessary" to the assembly process. See note 14, *supra*. Because the regulation thus conforms precisely to the text and history of the statute, the agency's interpretation is "'sufficiently reasonable' to be accepted by a reviewing court." *Zenith Radio*, 437 U.S. at 450. Even if respondent could articulate some different criteria for identifying operations that are incidental to the assembly process, that would not be a sufficient basis for rejecting the "reasonable" interpretation adopted by the agency. See, *e.g.*, *Aluminum Co. of America* v. *Central Lincoln Peoples' Utility Dist.*, 467 U.S. 380, 389 (1984).[15]

3. Finally, respondent contends (Resp. Br. 49-50) that this case should be remanded to permit a new attack on the validity of the regulations based upon the comments submitted in connection with the rulemaking procedure in 1974. This tardy request should be rejected by this Court.[16] The

[15] In this case, moreover, respondent does not even suggest that any alternative criteria for interpretation of the statute are preferable. Instead, respondent asserts (Resp. Br. 28) that the statute simply permits no interpretive guidance at all.

[16] Before this Court granted certiorari on September 29, 1998, respondent contended only that the regulation was facially inconsistent with the Tariff Act. On November 16, 1998, respondent, for the first time, made an informal request to the agency for the 1974 rulemaking comments. Two days later, respondent followed that with a formal Freedom of Information Act request that was submitted through an anonymous agent. Counsel for the government were first made aware of respondent's request when respondent's brief was filed in this Court on December 8, 1998. By then, a letter dated December 7, 1998, had been sent by the agency to advise respondent that the rulemaking comments had been located. Copies were supplied to respondent, and at least some of them

general rule that "an appellee may rely upon any matter appearing in the record in support of the judgment below" (*Blum* v. *Bacon*, 457 U.S. at 137 n.5) does not permit respondent to raise *new* arguments that "respondent failed to raise * * * below" (*Granfinanciera, S.A.* v. *Nordberd*, 492 U.S. 33, 38 (1989)). See note 16, *supra*.

Moreover, the materials in the rulemaking record support the reasonableness of the agency's judgment. Most of the comments favored the adoption of the proposed regulations to provide greater guidance and predictability on the issues addressed.[17] The numerous comments were carefully considered by the agency and were reflected in several changes from the proposed rule. See 40 Fed. Reg. 43,021 (1975). Respondent's belated effort to propel this litigation into the next millennium by the untimely assertion of its numerous new contentions should not be accepted by this Court.

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have been lodged with the Court. See Part I of the Second Lodging of Respondent (December 16, 1998). Because these materials have been available to respondent since 1974, the "supplemental" brief filed by respondent on December 16, 1998, violates Rule 25.5 of the Rules of this Court.

[17] See, *e.g.*, comments contained in Part I of the Second Lodging of Respondent (December 16, 1998), by C.J. Tower & Sons, Customhouse Brokers, dated August 29, 1974 ("The public will be well served by clearly written regulations such as were found in this proposed amendment. We compliment those who wrote it."); Mattel, Inc., dated August 30, 1974 ("It is conceded that there has been a definite need for guidelines regarding the use of 807.00 T.S.U.S. since September, 1963. We in the importing field appreciate the effort * * * to establish firm guidelines regarding these complex provisions."); the Foreign Trade Association of Southern California, dated August 30, 1974, at 1 ("our Association has always supported all efforts by the Customs Service to clarify the requirements for importations * * * . The Customs Service has done exemplary work in connection with Item 807.00."); the American Importers Association (August 29, 1974).

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

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